contracts, and that a less strict interpretation might, consistently with fairness to the surety, have more nearly effectuated the intention of the parties. *Cf. Drumheller* v. *Am. Surety Co.*, 71 Pac. Rep. 25 (Wash.).

COMPENSATION OF ASSISTANT PROSECUTOR BY PRIVATE PARTIES. — Under the old common law both in England and America prosecution for crimes was left to counsel employed by private parties except in cases where the state was directly interested. Now, however, statutes giving to public prosecutors exclusive control of prosecution, except for certain minor offenses, are universal throughout the United States. An interesting question arising out of this change was recently discussed in the Montana courts. It was held that a district attorney may during the trial receive assistance from counsel privately employed and compensated. *State* v. *Tighe*, 71 Pac. Rep. 3. One judge dissented on the ground that, "The private attorney's client is a stranger to the action. The private attorney represents vengeance. The state's attorney paid by the people is expected to represent justice." Some courts agreeing with this dissenting opinion maintain that to allow privately employed assistants to appear for the state is inconsistent with our theory of criminal prosecution, besides being impliedly prohibited by statutes forbidding the taking of private fees by district attorneys. *Biemel* v. *State*, 71 Wis. 444. The weight of authority, however, even where such statutes exist, is clearly in accord with the principal case. *State* v. *Bartlett*, 55 Me. 200; *Keyes* v. *State*, 122 Ind. 527.

Under the old law compensation necessarily came from private sources in many cases. The private employment of assistant prosecutors was thus proper formerly, and there has been no express prohibition of the practice since. The only question then is whether the change in our system of prosecution for crime has impliedly excluded all private interference and aid. Criminal prosecution is now strictly an affair of the state. It is and always must be under the control of counsel employed by the government, and they as public officers cannot delegate their power. The ideal, it may be said, toward which our law is tending is the elimination of the idea of individual vengeance. The prosecuting attorney should seek the conviction and punishment of the prisoner, not for the satisfaction of the injured persons, but for the protection of society and the effect on the criminal himself. As a representative of the state he seeks the promotion of justice and occupies a position similar to that of the judge. In the management and the withdrawal of prosecutions he has important discretion. That he may be free to act in accordance with justice and the public interests he must remain independent and free from all obligation to the parties interested in securing convictions. The private employment of an assistant, it is urged, will inevitably introduce into the prosecution an undesirable element of partisanship.

In such an argument there is undoubtedly much force. If, however, the official public prosecutor himself is forbidden to receive compensation from private parties, and is left in full control, the policy underlying the statutes would seem to be well satisfied. The interest of the state will then be the paramount influence. All that the private attorney can do is to help forward that interest and so incidentally to satisfy his client. It is desirable that the state's attorney should be allowed to receive all necessary aid that he may successfully prosecute the guilty. Justice is best promoted, not by

a judicial impartiality on his part, but by a vigorous and carefully prepared presentation of his side of the case. It is doubtful, also, whether the theory that the state is the sole party in interest is sound. The injured parties as individuals have surrendered their natural right of punishment to the state, but it would seem that they retain an interest in the state's enforcement of that right. In some measure, then, the prosecutor represents them, and is under an obligation to accept their aid, that their wrongs may be requited and their future protection secured. Such participation cannot be demanded as an absolute right, but it seems desirable that the court should have discretion to allow it at the request of the district attorney.

PAYMENT OF FORGED BILLS BY DRAWEE. — The rule has been laid down, and is regarded as well settled, that a drawee accepts or pays at his peril a forged bill in the hands of a holder in due course. *Price* v. *Neal*, 3 Burr. 1354. The most satisfactory explanation of this doctrine yet advanced seems to be that, as between two persons with equal equities, one of whom must suffer, the one having legal title should prevail. See 4 HARV. L. REV. 299. From this explanation writers on quasi-contracts have dissented, urging that the drawee should be allowed a recovery against the holder, as of money paid under a mistake of fact. See KEENER, QUASI-CONT. 154–158. In support of this latter contention it is pointed out that the holder suffered his loss when he gave value for a worthless piece of paper, and that in retaining the money paid him by the drawee, he simply makes his loss good at the expense of one against whom he has acquired no claim whatever; in short, that the equity of the holder is an equity against his transferrer alone, and thus is not involved in the case at all. This criticism of the theory of "equal equities," as explaining the doctrine of *Price* v. *Neal*, seems to proceed on a misinterpretation. There are no equal equities involved, in the sense of equitable claims against the same person in respect to the same *res*. The doctrine simply means that, as between parties equally meritorious, a legal title will not be disturbed. Both parties have paid out their money under an innocent mistake as to the same fact; but the holder now has legal title to the money he has received or, in case the bill has been only accepted, to the contract obligation to pay. Consequently there is no reason in equity for depriving him of that legal title.

If, however, for any reason the parties are not equally meritorious, the principle does not apply. In a recent Washington case the holder bought without inquiry or identification checks presented by an unknown man. The drawee paid the checks, but was allowed to recover the amount when it appeared that the checks were forged. *Canadian Bank* v. *Bingham*, 71 Pac. Rep. 43. The holder's negligence made him less meritorious than the drawee, and hence the case fell outside the doctrine of *Price* v. *Neal*. If however both parties are equally negligent, it is difficult to see how the plaintiff can recover.

The cases where the transaction between the holder and the drawee is not a payment but a sale should be carefully distinguished. In such cases the holder impliedly warrants the genuineness of the instrument and should be held to his warranty. *Fuller* v. *Smith*, 1 C. & P. 197.